In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
ERNEST D. JONES)		
(Chapter 7 Case 91-41946)	)	Number 93-4172
	)	
Debtor	)	
	)	
	)	
	)	
ERNEST D. JONES)		
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
BENNIE LOU HAUSENFLUCK	)	
f/k/a Bennie Lou Jones	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

On September 20, 1994, a hearing was held upon a Complaint to Determine Dischargeability of a divorce related debt pursuant to 11 U.S.C. Section 523(a)(3). Upon

consideration of the evidence adduced at trial, the record in the case, the record in the Debtor's Chapter 7 case, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor and his former Wife were divorced on September 18, 1990, after an uncontested proceeding. The parties had been married for 14 years and there were no children of the marriage.

The parties entered into an "Agreement" which was incorporated into the Final Decree of Divorce. The parties jointly owned property located in Jasper County, South Carolina, and Effingham County, Georgia. The property in South Carolina consisted of seven acres devoid of any structures with a value of about $7,000.00 at the time of the divorce. The property in Georgia was the marital homeplace. The homeplace in Effingham County, Georgia had a first and second mortgage on it at the time of the divorce agreement. The second mortgage on the property was approximately $13,000.00.

The Wife was awarded the real estate in South Carolina in the divorce proceeding. She subsequently sold that property sometime in 1993 for $10,000.00. The real estate in Georgia was to be sold and the equity proceeds, if any, were to be divided among

the parties. The Georgia property was foreclosed upon by the first mortgage holder and the second mortgage holder obtained a deficiency judgment against the Wife in the amount of $13,322.49, exclusive of interest.

The divorce decree and agreement provides as follows:

> ALIMONY
>
> Husband shall pay to Wife as alimony for her support the sum of $50.00 each and every week for a period of twenty-four (24) months, at which time said obligation shall cease. Payments shall commence on the Friday first following the execution of this Agreement. Said payments shall be mailed to P.O. Box 7132, Garden City, Georgia 31418. The statutory modification rights waived herein shall include those rights set out in O.C.G.A. Section 19-6-19, et.seq., and similar laws of this State and of any other jurisdiction.
>
> EQUITABLE DIVISION OF PROPERTY
>
> 1.
>
> Contemporaneously with the execution of this Agreement and as a part of the equitable division of the marital estate and as part of the equitable division of property, Husband shall execute a Quitclaim Deed from himself to Wife conveying to her all his right, title and interest in the real property known as 7.00 acres near the town of Hardeeville, Jasper County, South Carolina. Said property is more particularly described in the Quitclaim Deed attached hereto as Exhibit "A." Wife hereby agrees to hold Husband harmless for and fully indemnify him against any liability with respect to said property.

2.

As further equitable division of the marital property, the marital home, more fully described as Route 2, Box 473A, Rincon, Georgia, [sic] with a reputable real estate company for sale immediately by both parties at a price agreed upon by both parties. In the event the parties cannot agree on a sales price, then each party shall hire an appraiser of his or her own choosing who, in turn, shall select a third appraiser who shall determine the fair market value of the home and set a sales price which shall be binding upon the parties. Both parties shall cooperate in the sale of the home and do everything required of them by the real estate company to expedite the sale thereof. Any repairs to the house will be done upon the recommendation or the direction of the real estate company, if reasonable. Once the house is sold, the net proceeds from the sale shall be divided equally between the parties on a 50%-50% basis. In determining the net proceeds, the first and second mortgage shall be deducted from the sales price along with any and all other costs of closing, including the cost of the appraisers, the cost of repairs to the house for sales purposes, and any other legitimate costs concerning the sale of said home.

In the event the parties agree otherwise, the marital residence may be disposed of in an alternate basis as follows: Either party may sell their interest in the marital residence to the other party in an agreed-upon amount.

Both parties shall have the right to attend the closing and the Defendant shall give the Plaintiff reasonable advance notice of the exact time and location of the closing.

The Husband shall be responsible for all debt on the marital residence until same is sold and Husband shall pay and hold Wife harmless for any claims, debts, liabilities or other obligation connected with said property.

Bennie Lou Jones v. Ernest Donald Jones, Effingham Superior Court, Civ. Action No. 1E1990DR032N, filed September 18, 1990.

The obligation to make the mortgage payments is contained in a paragraph specifically headed, "Equitable Division of Property" and the alimony provision is specifically headed, "Alimony." Debtor testified at the hearing that the agreement, as written, was the intended agreement of the parties and that the alimony was specifically discussed and set out as provided in the agreement. Wife testified that she relied upon the future payment of her equity in the homeplace as additional support and on that basis she agreed to the alimony provisions.

The Wife did not introduce any evidence, nor provide any testimony concerning her income and expenses for the period of July 19,1989, until September 18, 1990 (the date of first separation through the entry of the uncontested divorce), other than the sole assertion that she needed more money to live on. The Court is unaware of her employment at the time of the entry of the agreement and has no knowledge of her living expenses.

The Debtor testified that he paid the first and second mortgage on the

Georgia property until he no longer had funds with which to pay. The evidence also shows that the Debtor made cash advances against the second equity mortgage on the marital residence, starting shortly after the date of separation and continuing until after the divorce. The Plaintiff testified that he needed the money to pay living expenses.

CONCLUSIONS OF LAW

Section 523(a)(5) excepts from discharge a debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . .", but only if the debt is "actually in the nature of alimony, maintenance, or support."[1] The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985) (*quoting* H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U.S. Code Cong. & Admin. News 5787, 6319). To be declared

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[1] 11 U.S.C. Section 523(a)(5), in relevant part, provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-

(5) to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law, a governmental unit, or property settlement agreement, but not to the extent that--

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

non-dischargeable, the debt must have been actually in the nature of alimony, maintenance or support. Harrell, 754 F.2d at 904.

The non-debtor spouse (or spouse asserting an exception to dischargeability) has the burden of proving that the debt is within the exception to discharge. In re Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 111 L.Ed.2d 755 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906. *Accord* Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. In re Bedingfield, 42 B.R. 641, 645-46 (S.D.Ga. 1983). *Accord* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983). According to the Eleventh Circuit in Harrell:

> The language used by Congress in Section 523(a)(5)

> requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only "a simple inquiry" was needed, the court did not set forth the guidelines or factors to be considered. Other courts have held that, while bankruptcy law controls, a court may consider state law labels and designations in making its inquiry. *See* In re Holt, 40 B.R. 1009, 1011 (S.D.Ga. 1984) (Bowen, J.).

The Bankruptcy Court must determine if the obligation at issue was intended to provide support. Calhoun, 715 F.2d at 1109. In making its determination, the Court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a settlement agreement, the Court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the Court should focus upon the intent of the trier of fact. In re West, 95 B.R. 395 (Bankr. E.D.Va. 1989). *See generally* In re Mall, 40 B.R. 204 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions

of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helm, 48 B.R. 215 (Bankr. W.D.Ky. 1985) ("It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and re-examine.")

In determining whether an obligation is actually in the nature of support, the following factors may be considered:

> 1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.
>
> 2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (*Citing* Matter of Woods, 561 F.2d 27, 30 (7th Cir. 1977).)
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> 3) If the divorce decree provides that an obligation therein

terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property rather than an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into consideration all the provisions of the decree. *See* In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

As applied to the facts in this case, I conclude that the Wife has not proven by a preponderance of the evidence that the obligation at issue is actually in the nature of support.

The express alimony provisions of the settlement agreement indicate that the Defendant needed very little by way of support from her former husband ($50.00 each week for 24 months). Since there was no evidence of the parties' income and expenses at

that time, I am unable to conclude that the Wife was in need of additional support beyond the alimony provisions of the agreement. I cannot speculate as to whether she had insufficient income to support herself, but I can conclude that since the alimony provisions were set out separately in the agreement, the amount to be paid under that provision reflected the extent of her support need at the time.

The parties had no minor children, and thus the second traditional factor is not implicated.

As to the third, Debtor and Wife were joint owners in the real property and therefore her interest in the property and husband's obligation to pay the debt upon the property, would not terminate upon her death or remarriage. Thus this factor suggests that the division of the equity after sale of the property and the debt obligation is not to be considered alimony, but a property division.

The fourth factor is whether or not the payment provision is manifestly unreasonable. Neither party submitted evidence of Debtor's income and obligations at the time of the agreement, therefore the Court cannot determine the reasonableness of the payments he was required to make. The sole evidence on this point was his testimony that he became unable to continue making the mortgage payments in 1991, prior to the filing of

his Chapter 7 case, but this was in the post-divorce period and is not relevant.

According to Harrell, this Court may not consider a spouse's current income and situation in deciding if a payment provision was intended as support or reasonable. Harrell, 754 F.2d 906-07. The Court should consider the ability to pay and intent of the parties prior to and as of the time the divorce became final. If there has been a significant change in circumstances since the divorce, the state court has the authority to permanently or temporarily adjust a support provision; this Court does not have such authority.

The duty of this Court is to determine if the obligation was actually in the nature of support. I conclude after balancing all of the relevant factors that the obligation in question was not in the nature of support and that there is no Section 523(a)(5) debt owed to Wife since the house, in fact, had no equity. Whether on these facts a 523(a)(6) action arising from Debtor's allegedly willful failure to pay the monthly mortgage might have been provable is not before me, since that cause of action was neither pled nor argued.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Ernest D. Jones to Bennie Lou

Hausenfluck to pay the deficiency judgment of $13,322.49 is dischargeable in this proceeding.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1994.